

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS**

MICHEL KECK,

Plaintiff,

v.

MIX CREATIVE LEARNING  
CENTER, LLC; JACQUELINE P.  
KENNEALLY and DOES 1 through  
10 inclusive,

Defendants.

Case No. 4:21-cv-00430

**SEPARATE STATEMENT OF  
UNDISPUTED FACTS**

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Plaintiff Michel Keck respectfully submits the following separate statement of undisputed facts in support of his Motion for Summary Judgment as to Liability:

1. Michel Keck (“Keck”) is a professional artist by trade.

**Supporting Evidence:**

Declaration of Michel Keck (“Keck Decl.”) ¶2.

2. Keck’s corporate projects include working with many of Nordstrom’s Department stores across the U.S. to create original mixed media pieces for their Savvy Departments, and creating mixed media pieces for national restaurant chain Bar Louie.

**Supporting Evidence:**

Keck Decl. ¶4.

3. In addition to creating artwork, Keck also sell various pieces of merchandise featuring her original mixed media designs.

**Supporting Evidence:**

Keck Decl. ¶5.

4. One of Keck’s most popular collections is her Dog Art series comprising mixed media collage style paintings of various dog breeds.

**Supporting Evidence:**

Keck Decl. ¶6.

5. Keck is the sole creator and exclusive rights holder to six works, including a Bulldog (“Bulldog Work”), a Labrador (“Labrador Work”), a Snorkie (“Snorkie Work”), a Shih Tzu (“Shih Tzu Work”), a Great Dane (“Great Dane Work”) and a German Shepard (“German Shepard Work”), (collectively the “Works”).

**Supporting Evidence:**

Keck Decl. ¶¶7-15, Exhibits A-D.

6. Keck has registered the Works with the United States Copyright Office.

**Supporting Evidence:**

Keck Decl. ¶¶9-15, Exhibits A-D.

7. The Bulldog Work, Labrador Work, Shih Tzu Work, and German Shepard Work were registered under registration VA 1-814-036 with an effective registration date of March 26, 2012.

**Supporting Evidence:**

Keck Decl. ¶¶10-11, Exhibit B.

8. The Great Dane Work was registered under registration VA 2-041-480 with an effective registration date of October 29, 2016.

**Supporting Evidence:**

Keck Decl. ¶¶12-13, Exhibit C.

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9. The Snorkie Work is registered under registration VA 2-104-131 with an effective registration date of May 23, 2018.

**Supporting Evidence:**

Keck Decl. ¶¶14-15, Exhibit D.

10. In addition to a protectable copyright interest in the Works, Keck has also registered the word mark “Michel Keck” with the United States Patent and Trademark Office under registration number 5280022 (“Trademark”).

**Supporting Evidence:**

Keck Decl. ¶¶16-17, Exhibit E.

11. Keck utilizes the Trademark in connection with both her artwork as well as the various merchandise and other products that she sells.

**Supporting Evidence:**

Keck Decl. ¶18.

12. Defendant Jaqueline P. Kenneally (“Kenneally”) is the sole proprietor and 100% owner of Mix Creative Learning Center, LLC (“Mix Creative”).

**Supporting Evidence:**

Declaration of Mathew K. Higbee (“Higbee Decl.”), Exhibit J, ROG No. 1; Exhibit K, ROG No. 1; Exhibit L, RFA No. 1; Exhibit M, RFA No. 1.

13. Mix Creative is the owner and operator of the website [www.artmix.studio](http://www.artmix.studio).

**Supporting Evidence:**

Higbee Decl., Exhibit L, RFA No. 2.

14. During the relevant time period, Mix Creative offered a number of paid products and services through its website including lesson memberships, painting kits, party bookings, and more.

**Supporting Evidence:**

<https://bit.ly/3VxBk34> (last accessed October 14, 2022)<sup>1</sup>.

15. In November 2020, Keck discovered that Defendants a product being sold through the Mix Creative website for \$40.00 titled “Michel Keck inspired dog masterpiece kit” (“Artmix Kit”).

**Supporting Evidence:**

Keck Decl. ¶¶19-20, Exhibit F; Higbee Decl., Exhibit L, RFA Nos. 3-4.

16. Keck subsequently purchased an ArtmixKit.

**Supporting Evidence:**

Keck Decl. ¶22, Exhibit G.

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<sup>1</sup> “Courts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned[.]” *Erickson v. Nebraska Mach. Co.*, 2015 WL 4089849, at \*1 (N.D. Cal. July 6, 2015); *see also Pond Guy, Inc. v. Aquascape Designs, Inc.*, 2014 WL 2863871, at \*4 (E.D. Mich. June 24, 2014) (“As a resource the accuracy of which cannot reasonably be questioned, the Internet Archive has been found to be an acceptable source for the taking of judicial notice.”); *Martins v. 3PD, Inc.*, 2013 WL 1320454, at \*16 n.8 (D. Mass. Mar. 28, 2013) (taking judicial notice of “the various historical versions of a website available on the Internet Archive at Archive.org as facts readily determinable by resort to a source whose accuracy cannot reasonably be questioned”); *Foreword Magazine, Inc. v. OverDrive, Inc.*, 2011 WL 5169384, at \*3 (W.D. Mich. Oct. 31, 2011) (“[T]he federal courts have recognized that Internet archive services, although representing a relatively new source of information, have sufficient indicia of reliability to support introduction of their contents into evidence, subject to challenge at trial for authenticity.”).

The infringement in this matter was discovered in November 2020 and the Complaint filed in February 2021. The webpage captured by the Wayback Machine is dated January 28, 2021. Accordingly, Keck respectfully requests that the Court take judicial notice of the archived webpages as reflective of how the Mix Creative website appeared during the relevant time frame because it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(1).

17. Upon receiving the ArtmixKit in the mail, Keck discovered that it included unauthorized copies of her Works.

**Supporting Evidence:**

Keck Decl. ¶23, Exhibit G; Higbee Decl., Exhibit L, RFA Nos. 6, 8, 10, 12, 14, 16.

18. Kenneally was solely responsible for the creation and assembling of the ArtmixKit.

**Supporting Evidence:**

Higbee Decl., Exhibit J, ROG Nos. 7-12.

19. In order to obtain the Works to place in the Artmix Kit, Kenneally personally performed a Google Images search wherein she saw images of Keck's dog paintings, including the Works, in the search results, and then she right clicked on one of the images of the Works, and selected "copy image," and then pasted and saved the image locally on to her computer or into a document on the computer, and used the copy to create materials included in the Artmix Kit.

**Supporting Evidence:**

Higbee Decl., Exhibit K, ROG No. 2.

20. When performing a Google Image search and reviewing the search results, the image that is clicked is enlarged and appears in a black box with the disclaimer "Images May Be Subject To Copyright. Learn More" and containing a link to an article on Google's "Copyright Help Center" entitled "What is Copyright?"

**Supporting Evidence:**

Higbee Decl. ¶¶2-11, Exhibits H and I.

21. Keck never authorized Mix Creative or Kenneally to use the Trademark to sell the Artmix Kits, nor did she authorize Defendants to include copies of her Works in the Artmix Kits.

**Supporting Evidence:**

Keck Decl. ¶24.

22. The Bridge Shelter Image was first published on or about April 15, 2014 in the New York Post. See <https://bit.ly/3cUxw5u>.

**Supporting Evidence:**

Farrington Decl. ¶31.

23. Farrington registered the Guangbiao and Bridge Shelter Images with the United States Copyright Office under registration certificate VA 2-023-555 with an effective date of September 29, 2016.

**Supporting Evidence:**

Farrington Decl. ¶32, Exhibit H.

24. BackChina, LLC owns and operates the websites [www.backchina.com](http://www.backchina.com) and [www.21uscity.com](http://www.21uscity.com).

**Supporting Evidence:**

Complaint ¶12; Answer ¶12; Declaration of Mathew K. Higbee (“Higbee Decl.”) ¶¶3-4, Exhibits A and B.

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Dated: October 14, 2022

Respectfully submitted,

**/s/ Mathew K. Higbee**

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